15

Office - Supreme Court, U.
FILED
NOV 5 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953

No. 456

HUGHES CONSTRUCTION COMPANY
Petitioner-Appellee Below

versus

SECRETARY OF LABOR
Respondent-Appellant Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EBERHARD P. DEUTSCH
Attorney for Petitioner

DEUTSCH, KERRIGAN & STILES
ROBERT E. LEAKE, JR.
RENÉ H. HIMEL, JR.
Of Counsel

SUBJECT INDEX

	PAGE
I—QUESTIONS PRESENTED	2
II—JURISDICTION AND OPINIONS BELOW	3
III—SUMMARY STATEMENT OF THE MATTER INVOLVED	3
IV—REASONS RELIED ON FOR ALLOWANCE OF WRIT	5
V—CONCLUSION	10
VI—APPENDIX	11

LIST OF AUTHORITIES

Cases:

Bradley Mining Co. vs Boice, 345 US 932 (1953)	7
Higgins vs Carr Bros. Co., 317 US 572 (1943)	10
Jackson vs United States, 230 US 1 (1913)	8
Kirschbaum vs Walling, 316 US 517 (1942)	10
McLeod vs Threlkeld, 319 US 491 (1943)	9
McNabb vs United States, 318 US 332 (1943)	6
Overstreet vs North Shore Corp., 318 US 125 (1943)	9
Rosenberg vs Denno, 346 US 271 (1953)	6
10 East 40th Street Building, Inc. vs Callus, 325 US 578 (1945)	10
Tobin vs Pennington-Winter Const. Co., 198 F2d 334 (CA 10-1952), cert. den., 345 US 915-16	9
Wagner Co. vs Lyndon, 262 US 226 (1923)	6
Walling vs Jacksonville Paper Co., 317 US 564 (1943)	10

LIST OF AUTHORITIES—(Continued)

	PAGE
Walling vs Patton-Tulley Transp. Co., 134 F2d 945 (CA 6-1943)	9
Western Pacific Railroad Case, 345 US 247 (1953)	5, 7
William H. Banks Warehouses, Inc. vs Watt, 345 US 932 (1953)	7

Statutes:

A—28 USC 46(b)	5, 11
28 USC 46(d)	5, 11
(Appendix A)	
Fair Labor Standards Act, 29 USC 201 et seq. (Extracts—Appendix C)	12

Miscellaneous:

House Document No. 509, 78th Cong., 2d Sess..	8
House Document No. 90, 70th Cong., 1st Sess.	8
Rule 36, Court of Appeals, Fifth Circuit	5, 12
(Appendix B)	

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

HUGHES CONSTRUCTION COMPANY
Petitioner-Appellee Below

versus

SECRETARY OF LABOR
Respondent-Appellant Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit, rendered through an opinion by a judge who did not hear the argument, holding that every employee engaged in work of any character "pursuant to a comprehensive Congressional plan for the control" of the Mississippi River, is covered by the Fair Labor Standards Act; and petitioner respectfully shows:

I

QUESTIONS PRESENTED

The novel and significant questions presented in this case are:

> 1—Whether it is proper for a Court of Appeals to render its decision of a case through an opinion written by a judge who was not present at the hearing of the appeal, and to fail to give consideration to a timely request for rehearing *en banc*.
>
> 2—Whether employees working on a flood-control levee several miles back from the Mississippi River, are "engaged in commerce" within the purview of the Fair Labor Standards Act.

The decision below, following argument before two judges with written opinion by a third who was not present for the argument, disregarded the line of demarcation carefully drawn by this court between the scope of the Fair Labor Standards Act and the breadth of Congressional authority under the commerce clause of the constitution.

It is submitted that this court's consideration of the issues involved in this case is warranted by the unprecedented procedure adopted by the Court of Appeals, and its extension of the scope of the Fair Labor Standards Act beyond its legislative intent as construed by this court.

II

JURISDICTION AND DECISIONS BELOW

This court's jurisdiction is invoked under 28 USC 1254.

The District Court's opinion, in petitioner's favor, was rendered on August 5, 1952 (R 43), and is reported at 106 FS 349.

The reversing opinion of the Court of Appeals was rendered on June 30, 1953 (R 58), and is reported at 205 F2d 606. A request for rehearing *en banc* was denied on August 31, 1953 (R 75), with opinion by the same judge who wrote the original opinion for the court. 206 F2d 505.

III

SUMMARY STATEMENT OF THE MATTER INVOLVED

This was an action to enjoin petitioner from violating the overtime and record-keeping provisions of the Fair Labor Standards Act as to certain of its employees.

In 1949, petitioner contracted with the United States for enlargement of a portion of White Oak Lake Levee in Tensas Parish, Louisiana, part of the system of levees providing flood protection for the Mississippi River basin.[1] The part of the levee involved lies three to six miles from the River.[2]

Petitioner concededly did not comply, as to employees engaged in this work, with overtime and record-keep-

[1] Exhibit P-5 (R 23).
[2] R 4, 14, 29, 44, 46.

ing provisions of the Act.[3] However, all of the employees were compensated, and all of petitioner's records were kept, in strict accord with the express terms of its contract with the United States, which significantly did not provide for coverage under the Fair Labor Standards Act; and petitioner's records were acceptable to the United States.[4]

The District Court found that the levee related only to flood protection of the area behind the levee, and that the activities of petitioner's employees were not in aid of navigation, and did not constitute repair, maintenance or improvement of the Mississippi River as an instrumentality of interstate commerce; and the court accordingly held that petitioner's employees were not in employment covered by the Act.[5]

Two judges of the Court of Appeals heard the oral argument. The court's opinion,[6] reversing the District Court, was rendered by a third judge, who was not present when the case was argued.

Without citing authority, the opinion summarily brought within the coverage of the Act all work of every character performed on every facet of the Mississippi River flood-control system. The singular ground assigned in support of the decision is that the work in question was a part of the "comprehensive Congressional plan for the control" of the Mississippi River.[7]

---

[3] R 10.
[4] R 5-7, R 22. The contract (Exhibit P-5) contained conventional minimum-wage and record-keeping provisions. See also R 48.
[5] R 46-47, 106 FS at 352.
[6] R 58, 205 F2d 606.
[7] R 59, 205 F2d 606-7. The Court of Appeals tacitly affirmed the District Court's co-ordinate holding that the employment involved did not constitute production of goods for commerce.

Application for rehearing was denied by written opinion, without mention of petitioner's request that a rehearing be granted *en banc*, on the apparent ground that presence of a quorum at the oral argument, and participation of a quorum in the decision, cured any irregularities in the court's procedure.[8]

IV

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

a

No provision of statute or rule contemplates rendition by a federal appellate court of an opinion written by a judge who did not hear the oral argument.

This court has recognized "the tradition of a three-judge appellate court".[9] While two judges may constitute a quorum,[10] there is no authority or precedent for hearing by two judges and opinion for the court by a third.

The composite judgment of an appellate court can properly be formulated only by interchange of the separate views of its judges, all informed by forensic advocacy.

---

[8] R 75-81, 206 F2d 505.

[9] *Western Pacific Railroad Case*, 345 US 247, 256, 258 (1953); 28 USC 46(b), Appendix A. Rule 36 of the Court of Appeals for the Fifth Circuit provides expressly "that whenever a full bench of three judges shall not be made up . . . so many of the district judges as may be necessary to make up a full court of three judges are hereby designated and assigned to sit in this court". See Appendix B.

[10] 28 USC 46(d), Appendix A.

Each judge presumably exercises some influence on his colleagues. In the case at bar, the absent judge, not having heard the argument, may well have led the other judges into the error which his opinion reflects.

The instant case strikingly presents the danger inherent in breach of the tradition that every suitor is entitled to the ear as well as the eye of each judge who decides his cause.[11]

It is true that in *Wagner Co. vs Landon*,[12] this court seemed to characterize the practice here attacked as "an irregularity which does not in the slightest degree affect the validity of the judgment".

But the judgment reviewed in that case was a state court decree assailed under the "due process" clause, a criterion which this court has expressly found too narrow a basis for its review of the proceedings of federal courts.[13]

The Court of Appeals for the Fifth Circuit has never, by rule or otherwise, established "the particular pro-

---

[11] "Oral argument frequently has a force beyond what the written word conveys." Frankfurter, J, in *Rosenberg vs Denno*, 346 US 271, 272 (1953).

[12] 262 US 226, 232 (1923).

[13] "While the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice' . . . which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." Frankfurter, J, in *McNabb vs United States*, 318 US 332, 340 (1943). It is submitted that these principles are equally applicable to civil cases.

cedure it will follow, henceforth, in exercising its *en banc* power", as required by this court in the *Western Pacific Railroad Case.*[14]

Petitioner made application for rehearing of the case at bar by the court *en banc,* so that the entire court might pass on the legal propriety of the procedure adopted by its division.

But, in a written opinion by the same judge who had rendered the original opinion, the court simply denied petitioner's application for rehearing, without even mentioning petitioner's request that the court exercise its *en banc* power.

In the *Western Pacific Railroad Case,* this court said that the *en banc* power is "a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate".[15]

In light of that pronouncement, the failure of the Court of Appeals even to consider petitioner's application for rehearing *en banc* warrants grant of *certiorari.*[16]

---

[14] 345 US 247, 268 (1953). This case was cited to the Court of Appeals in petitioner's application for rehearing *en banc.*

[15] Id., at p. 260.

[16] See: *William H. Banks Warehouse, Inc. vs Watt,* 345 US 932 (1953); *Bradley Mining Co. vs Boice,* 345 US 932 (1953).

b

Federal work in connection with the Mississippi River falls into two categories: (1) improvement of navigability; and (2) flood control.

In the beginning, "it was believed for over a hundred years that the Federal Government had no constitutional authority to expend funds on river work except for the improvement of navigation . . . Beginning in 1917 a broader view of the responsibility and authority of the United States was adopted and in that year the expenditure of Federal funds directly for flood-control purposes was authorized. In 1928 it was finally recognized that flood control in the alluvial valley and navigation on the river south of Cairo constituted a single great problem of such magnitude that it could be dealt with effectively only by the Federal Government." [17]

Assuming that expansion of Federal activities into the flood-control field has its constitutional source in the commerce, rather than in the general-welfare clause, certainly such activities lie on the extreme periphery of the power over interstate commerce.[18]

Employees engaged in flood-control work, even if in some remote way their activities may be considered to

[17] House Document No. 509, 78th Cong., 2d Sess., p. 5.

[18] The old so-called Eads theory that levee construction for purposes of flood control may have some effect on the navigability of the controlled stream [See *Jackson vs United States*, 230 US 1 (1913)] has long been abandoned. House Document No. 90, 70th Cong., 1st Sess., pp. 19-20, 80; R 26-42.

"affect" commerce, are obviously not "engaged in commerce" within the meaning of that term in the Fair Labor Standards Act.

This is the first decision extending that Act to flood-control work on protection levees having no reference to navigability of a stream. The two decisions heretofore constituting the literal high-water mark of the Act's application to employment in projects under Congressional authority for the improvement of interstate streams, both involved work having a direct effect on the navigability thereof.[19]

The holding below is made solely with reference "to a comprehensive Congressional plan for the control of" the Mississippi River, covering its "great alluvial valley". It contains no discussion of the peculiar facts of the particular situation concerned in the case at bar, and cites no authority in support of its conclusion.

The opinion necessarily involves categorical disregard of this court's pronouncements that "the application of the Act depends upon the character of the employee's activities", not on the overall nature of the work on which his employer is engaged;[20] and that employees whose activities merely "affect", rather than occur "in" commerce, are beyond the purview of the statute.[21]

---

[19] *Walling vs Patton-Tulley Transp. Co.*, 134 F2d 945 (CA 6-1943), concerned "dike and revetment work" whose purpose was "to direct and channelize the current of the river in order to prevent erosion and to maintain the minimum depth required by commercial navigation". *Tobin vs Pennington-Winter Const. Co.*, 198 F2d 334 (CA 10-1952), cert. den., 345 US 915-16, involved work on the Tenkiller Ferry Dam, a multiple-purpose project one of whose primary aims is aid to navigation. The dam will furnish 10% of the flow of water necessary to create and maintain the navigation channel of the Arkansas River, an existing instrumentality of interstate commerce.

[20] *Overstreet vs North Shore Corp.*, 318 US 125, 132 (1943).

[21] *McLeod vs Threlkeld*, 319 US 491 (1943).

The instant holding, in sum, effectively constitutes full abdication by the Court of Appeals of the "independent responsibility" placed upon it by this court's construction of the Act, "of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations".[22]

If the present decision—that all employees engaged in work of any character on any phase of the Mississippi River flood-control system are *ipso facto* within the Act's coverage—is allowed to stand, there will no longer be any distinction between the scope of the Fair Labor Standards Act and the sweep of the commerce clause itself; and this court's careful differentiation between the two concepts[23] will have been abrogated.

CONCLUSION

It is respectfully submitted that the novel and significant questions raised by the decision below are of such moment as to warrant resolution by this court.

EBERHARD P. DEUTSCH
Attorney for Petitioner

October, 1953

DEUTSCH, KERRIGAN & STILES

ROBERT E. LEAKE, JR.

RENÉ H. HIMEL, JR.

Of Counsel

---

[22] *10 East 40th Street Building, Inc. vs Callus*, 325 US 578, 579 (1945).
[23] *Kirchbaum vs Walling*, 316 US 517 (1942); *Walling vs Jacksonville Paper Co.*, 317 US 564 (1943); *Higgins vs Carr Bros. Co.*, 317 US 572 (1943).

APPENDIX

A

28 USC 46:

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

B

Rule 36, Court of Appeals, Fifth Circuit:

ASSIGNMENT OF JUDGES

It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may, at any time, by particular assignment, designate any district judge to sit as aforesaid.

—o—

C

Fair Labor Standards Act,
29 USC 201, et seq.
(Pertinent provisions):

203 As used in sections 201-219 of this title—

* * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

207 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the

production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

211 (c) Every employer subject to any provision of sections 201-219 of this title or of any order issued under said sections shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of sections 201-219 of this title or the regulations or orders thereunder.

215 (a) It shall be unlawful for any person . . . (2) (5) to violate any of the provisions of . . . section 207 [or 211(c)] of this title.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	7
Conclusion	14

CITATIONS

Cases:

Bennett v. *V. P. Loftis Co.*, 167 F.2d 286	11
Commercial Nat. Bank in Shreveport v. *Connolly*, 176 F.2d 1004, rehearing denied, 177 F.2d 514	13
Cuascut v. *Standard Dredging Corp.*, 94 F. Supp. 197	10
Cubbins v. *Mississippi River Comm'n*, 241 U.S. 351	9
Estate of Cochran et al. v. *Commissioner of Internal Revenue*, 345 U.S. 974	13
Fitzgerald Co. v. *Pedersen*, 324 U.S. 720	7, 8
Hughes v. *United States*, 230 U.S. 24	9
Jackson v. *United States*, 230 U.S. 1	7, 8
Lewis v. *Florida Power & Light Co.*, 154 F.2d 751	11
Mallonee et al. v. *Fahey et al.*, 345 U.S. 978	13
Mid-Continent Pipe Line Co. v. *Hargrave*, 129 F.2d 655	11
Oklahoma v. *Atkinson Co.*, 313 U.S. 508	9, 10, 11
Overstreet v. *North Shore Corp.*, 318 U.S. 125	7-8
Pedersen v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, modified and petition for rehearing denied, 318 U.S. 742	7
Ritch v. *Puget Sound Bridge & Dredging Co.*, 156 F.2d 334	9
Russell Co. v. *McComb*, 187 F.2d 524	11
Slover v. *Wathen*, 140 F.2d 258	11
In re Texas City Disaster Litigation, 197 F. 2d 771	13
Tobin v. *Pennington-Winter Const. Co.*, 198 F.2d 334, certiorari denied, 345 U.S. 915	9, 10, 11
United States v. *Tucker Truck Lines*, 344 U.S. 33	12
Wagner Co. v. *Lyndon*, 262 U.S. 226	12
Walling v. *Patton-Tulley Transp. Co.*, 134 F.2d 945	9
Walling v. *Sondock*, 132 F. 2d 77, certiorari denied, 318 U.S. 772	11
Western Pacific Railroad Case, 345 U.S. 247	12, 13
Western Pac. R. R. Corp. v. *Western Pac. R. Co.*, 197 F.2d 994	13

Federal Statutes:

	Page
Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C., Supp. V, 201 *et seq.*:	
Sec. 3(b)	2
Sec. 3(j)	3, 11
Sec. 7	4
Sec. 7(a)	3
Sec. 11(c)	3, 4
Sec. 15(a)(2)	4
Sec. 15(a)(5)	4
Flood Control Act of 1928, c. 569, 45 Stat. 534 as amended, 33 U.S.C. 702a *et seq.*	5
Judicial Code, 28 U.S.C.:	
Sec. 46(b)	4, 11
Sec. 46(c)	4, 11
Sec. 46(d)	4, 11

Miscellaneous:

House Document No. 90, 70th Cong., 1st Sess.	5
House Document No. 359, 77th Cong., 1st Sess.	5, 8
House Document No. 509, 78th Cong., 2d Sess.	5, 6, 8

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 456

HUGHES CONSTRUCTION COMPANY, PETITIONER

v.

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals on the merits (R. 57-58) is reported at 205 F. 2d 606. The opinion denying the petition for rehearing (R. 73-77) is reported at 206 F. 2d 505. The District Court's opinion (R. 43-49) is reported at 106 F. Supp. 349.

JURISDICTION

The judgment of the Court of Appeals (R. 59) was entered June 30, 1953. A petition for rehear-

ing (R. 60-65) was denied by the Court of Appeals on August 31, 1953 (R. 77). The petition for a writ of certiorari was filed on November 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees engaged in the repair, improvement and enlargement of an existing segment of the levee system for the main channel of the Mississippi River are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

2. Whether the Court of Appeals erred in denying a petition for rehearing *en banc* where the sole ground for the petition was the fact that the opinion of the three-judge division of the Court had been written by a member of the division who did not hear the oral argument.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C., Supp. V, 201 *et seq.*) are:

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 11. (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the pro-

visions of this Act or the regulations or orders thereunder.

* * * * *

Judicial Code (28 U.S.C. 46):

SEC. 46. Assignment of judges; divisions; hearings; quorum.

* * * * *

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

STATEMENT

The Secretary of Labor brought this action in the District Court for the Western District of Louisiana to enjoin petitioner from violating Sections 7, 11(c), 15(a) (2) and 15(a)(5) of the Fair Labor Standards Act of 1938 by failing to pay time

and one-half compensation for hours worked by his employees in excess of forty a week and by failing to make, keep and preserve proper wage and hour records (R. 1-3). The employees in question were employed in the performance of a contract between petitioner and the United States Corps of Engineers for the repair and improvement of an existing segment of the levee system for the main channel of the Mississippi River (R. 26, 32, 44), known as the White Oak Lake Levee.

Petitioner admitted (R. 26; also R. 32), and the District Court found (R. 44), that the White Oak Lake Levee, though a setback levee, is a segment of the levee system for the main channel of the Mississippi. It was constructed in 1931 and 1932 and is located in Tensas Parish, Louisiana, from two to six miles west of that portion of the Mississippi River known as Yucatan Cut-Off (R. 44). It is an integral part of a comprehensive plan for the control of floods in the alluvial valley of the Mississippi and for the improvement of the river between the Head of the Passes and Cape Girardeau, Missouri, as recommended by the Corps of Engineers and Mississippi River Commission (House Document No. 90, 70th Cong., 1st Sess., House Document No. 359, 77th Cong., 1st Sess., House Document No. 509, 78th Cong., 2d Sess.), and authorized by Congress under its power to regulate commerce (Flood Control Act of 1928) (c. 569, 45 Stat. 534) and acts amendatory thereof (33 U.S.C. 702a *et seq.*)).

The Mississippi River is indisputably navigable and levees in its main-line system, though primarily

flood control measures, "have a definite effect on navigation" (House Document No. 509, *supra,* p. 8). By confining the river between its banks and thereby increasing the volume and the velocity of the water carried by it, they add to the river's hydraulic efficiency (R. 35, 58). The White Oak Lake Levee, as both courts below found, is part of the main-line levee system (R. 44, 58).

With respect to the flood control features of the White Oak Lake Levee, the District Court recognized that the levee gives flood protection to a large valley comprised of some twenty-five Louisiana parishes, and that this protection extends to interstate highways, railroads, telephone and telegraph lines, and other instrumentalities of commerce in the valley, as well as to thousands of acres of rich farm lands that produce cotton, sugar, rice and other crops for interstate commerce, and to sawmills, stave factories, and oil and gas wells which also produce goods for interstate commerce (R. 45).

The District Court held the Fair Labor Standards Act to be inapplicable to the work of petitioner's employees in enlarging the White Oak Lake Levee on the ground that the levee by itself would have only a remote influence on the channel of the Mississippi, its main contribution being to flood control (R. 47-48). The Court of Appeals reversed, pointing out in its unanimous decision that the White Oak Lake Levee is part of the main-line levee system of the Mississippi, that it was constructed and subsequently enlarged pursuant to a

comprehensive Congressional plan for the control of that river, and that levees affect the hydraulic efficiency of a river "whether they are one hundred feet, one mile, or even five miles from the river, since the matter is one of degree." (R. 58).

In deciding this case, the Court of Appeals acted through a three-judge division composed of Circuit Judges Holmes, Borah and Rives. The latter two heard the oral argument. Judge Holmes' absence was due to the fact that on Monday morning of the week of the argument he met with a traffic accident while on his way to court and was confined in a hospital (R. 74) when this case was argued the following Thursday, May 14, 1953 (R. 56). The writing of the opinion was assigned to Judge Holmes by the two judges who heard the oral argument (R. 74).

ARGUMENT

1. The decision of the Court of Appeals correctly applies the principles of this Court's decisions and does not conflict with the decision of any other United States Court of Appeals. Its holding that levee repair work on the Mississippi River is covered by the Act is in accord with this Court's decisions in *Overstreet* v. *North Shore Corporation,* 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.,* 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742; *Fitzgerald Co.* v. *Pedersen,* 324 U. S. 720; and *Jackson* v. *United States,* 230 U. S. 1. In the *Overstreet* case, the Act was held applicable to employees engaged in the maintenance and improvement of existing instru-

mentalities of interstate commerce on the ground that such work "in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' " (318 U. S. at 130). These principles were applied in the *Pedersen* case to hold that employees constructing entirely new abutments to an interstate railroad bridge were covered by the Act (324 U. S. at 724). The applicability of the principles of the *Overstreet* and *Pedersen* cases to levee repair work on the Mississippi is plainly indicated by the *Jackson* case which, though not decided under the Fair Labor Standards Act, recognizes the close and integral relation of levees to the improvement and maintenance of the river's navigable channel as an instrumentality of commerce.

The original construction of White Oak Lake Levee and the enlargement project here involved were indisputably authorized by Congress as part of a comprehensive plan for "improving the river in all of its aspects" (House Document, No. 359, 77th Cong. 1st Sess. p. 12). The close and integral relation between flood control and navigation is expressly recognized in the engineering reports dealing with this comprehensive plan for the Mississippi (House Document No. 359, *ibid;* House Document No. 509, 78th Cong. 2d Sess. p. 5). At an early date, this Court recognized that the main-line levees for the Mississippi improve its navigability "by confining its waters within its banks, thus directing its energies to cutting out a deeper channel" (*Jack-*

son v. *United States,* 230 U. S. 1, 18; also, *Hughes* v. *United States,* 230 U. S. 24, 27; and *Cubbins* v. *Mississippi River Comm'n,* 241 U. S. 351, 369). Later, in *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, this Court recognized that flood control projects frequently aid navigation, in that they "serve the 'double purpose' of 'keeping back the floods' and relieving 'summer navigation from obstruction, by allowing the surplus so retained, to pass down in the season of low water' " (313 U. S. at 522). Specifically with respect to floods on the Mississippi, the *Atkinson* decision said: "Huge crop damage, the loss of buildings, bridges and livestock, pollution of fertile fields, the erosion of rich farm lands, *bank cavings, interruption of navigation, injury of port facilities, the creation of sand bars in the channels, interruption or stoppage of interstate transportation by rail, truck and motorcar* * * * all these are now familiar costs of the floods on the Mississippi" (*id.* at 520-521, emphasis supplied).

Three United States Courts of Appeals and one District Court have specifically held improvements of interstate waterways to be within the "in commerce" coverage of this Act. *Walling* v. *Patton-Tulley Transp. Co.,* 134 F. 2d 945 (C. A. 6) (construction of dikes and revetments on the Mississippi River); *Ritch* v. *Puget Sound Bridge & Dredging Co.,* 156 F. 2d 334 (C. A. 9) (improvement of a navigable harbor by the dredging of new channels and the construction of new piers); *Tobin* v. *Pennington-Winter Const. Co.,* 198 F. 2d 334

(C. A. 10), certiorari denied, 345 U. S. 915 (improvement of the Arkansas and Mississippi Rivers by the construction of a multiple-purpose dam on a non-navigable tributary); *Cuascut* v. *Standard Dredging Corp.*, 94 Supp. 197 (D. Puerto Rico, 1950) (improvement of San Juan Bay by various dredging projects). In the first two of these cases, the structures were constructed on the navigable river or channel itself. In the third case, *Tobin* v. *Pennington-Winter Const. Co.*, the new structure was even farther removed physically from the navigable channel than is the structure in the instant case, the dam there being 13 miles upstream on a non-navigable tributary. But, as the Tenth Circuit held, this did not make it any the less a vital part of the commerce. "The construction of levees, dams and other improvements on any of the streams within the watershed of the Missouri and Mississippi Rivers, constructed for the purpose of aiding navigation and preventing floods, must be considered as items of a single project undertaken to effectuate such purposes" (198 F. 2d at 337). This view accords with the holding of this Court in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, that river development projects are to be viewed realistically "as a whole" (*id.* at 528), not each "project in isolation from a comprehensive plan covering the entire basin of a particular river" (*id.* at 525; also, 527).

The court below, stressing the fact that the White Oak Lake Levee is a segment of the levee system for the main channel of the Mississippi and was

constructed and later enlarged pursuant to a comprehensive plan covering the entire river (R. 58), followed the realistic approach suggested in the *Atkinson* case and applied by the Tenth Circuit in the *Pennington-Winter* case.[1]

2. Petitioner's reason for requesting a rehearing *en banc* was plainly without merit and does not warrant review by this Court. The Judicial Code authorizes the Courts of Appeals to hear and determine cases by three-judge divisions (28 U.S.C. 46(b) and (c)) and provides that "A majority of the number of judges authorized to constitute a court or division thereof * * * shall constitute a quorum" (28 U.S.C. 46(d)).

Admittedly, the *en banc* suggestion was included in the petition for rehearing solely for the purpose of having the entire court "pass on the legal propriety of the procedure adopted by its division" (Petition for Certiorari, p. 7). Thus, the only question the full court would have had to consider, if the *en banc* suggestion had been followed, is the very

---

[1] An additional argument in support of coverage in the instant case, resting on the "production for commerce" basis, was presented to the court below, but its decision did not rest on this ground. This argument, which we submit is an additional sound basis for holding petitioner's employees within the coverage of the Act, is that the flood control aspects of the project are equivalent to "protective or custodial" services to producers of goods for commerce, which have consistently been held to be within the scope of the definition of Section 3 (j) of the Act. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C. A. 10); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U.S. 772; *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); and *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4).

simple one of whether two judges of a three-judge division constitute a quorum. That the division to which this case was assigned was properly constituted cannot be questioned. It was composed of three circuit judges. Two of them, clearly constituting a quorum, heard the oral argument and concurred in the result reached by the division as a whole. The judge who wrote the unanimous opinion, though not present at the oral argument, was a member of the division at the time the case was submitted. Despite his obvious absence at the oral argument, and despite the presiding judge's announcement that Judge Holmes would not be present but would consider the case on the briefs, counsel for petitioner made no objection to this procedure until a decision unfavorable to petitioner was rendered. Petitioner may not now raise this objection for the first time. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33. Moreover, the court's opinion was written by Judge Holmes on assignment from the two members who heard the oral argument (R. 74). Under these circumstances there can be no question of the propriety of the procedure. As this Court said in *Wagner Co.* v. *Lyndon*, 262 U.S. 226, 232, where oral argument had been heard by three judges of a four-judge panel and the opinion was written by the fourth judge, the procedure "is at most an irregularity which does not in the slightest degree affect the validity of the judgment."

Not only was petitioner's request for rehearing *en banc* wholly groundless, but, unlike the *Western*

Pacific Railroad Case, 345 U.S. 247, the court below here did not strike out petitioner's *en banc* request "as being without authority in law or in the rules or practice of the court" (see *Western Pac. R. R. Corp.* v. *Western Pac. R. Co.,* 197 F. 2d 994 at 1012 (C.A. 9)). While the opinion in the instant case on the petition for rehearing does not mention the *en banc* request, this Court in the *Western Pacific Railroad Case* made it clear that "Counsel's suggestion need not require any formal action by the court; it need not be treated as a motion" (345 U.S. at 262). Also unlike the *Western Pacific Railroad Case,* there is nothing in the opinion of the court below here to indicate that the court denied petitioner's *en banc* request because of any misapprehension of its jurisdiction.

If, as petitioner claims, the court below has not established the procedure it will follow in exercising its *en banc* power,[2] we doubt that this alone would justify the granting of certiorari in view of the plain lack of merit in petitioner's reason for requesting an *en banc* hearing. See *Estate of Cochran et al.* v. *Commissioner of Internal Revenue,* 345 U.S. 974, and *Mallonee et al.* v. *Fahey et al.,* 345 U.S. 978, in which review on the basis of the *Western Pacific Railroad Case* was denied.

---

[2] That the Fifth Circuit Court of Appeals has some procedure for *en banc* hearings is apparent from the fact that it has sat *en banc* in cases involving important or complicated issues. See *Commercial Nat. Bank in Shreveport* v. *Connolly,* 176 F. 2d 1004, rehearing denied, 177 F. 2d 514 (C.A. 5); *In re Texas City Disaster Litigation,* 197 F. 2d 771 (C.A. 5).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
SYLVIA S. ELLISON,
Attorneys,
United States Department of Labor.

DECEMBER, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 261550 626